REMARKS

Applicants have carefully reviewed this Application in light of the Final Office Action dated April 17, 2009 ("Office Action"). The Office Action rejects Claims 1-45. To expedite issuance of a patent from this Application, Applicants herein amend Claims 1 and 16-32. Applicants do not admit that any amendments are necessary due to the cited references or any of the Office Action's rejections. Applicants respectfully request the Examiner to reconsider and allow all pending claims.

Information Disclosure Statement

On December 29, 2006 and March 26, 2008, Applicants electronically filed Information Disclosure Statements (IDSs) and PTO-1449 Forms listing references submitted for consideration. Copies of the cited references were also included. It is not clear to Applicants that the Examiner considered the IDSs in their entirety. Applicants respectfully request that the Examiner consider the IDSs filed December 29, 2006 and March 26, 2008 by initialing next to the references on the PTO-1449 Forms. Such action is required for the Office Action to be complete.

Specification Objection

The Office Action objects to the Specification under 37 C.F.R. § 1.75(d)(1). In particular, the Office Action asserts that the Specification fails to provide antecedent basis for Claim 16. (Office Action, p. 2). Without admitting to this assertion, Applicants respectfully submit that Claim 16, as amended, satisfies the requirements of 37 C.F.R. § 1.75(d)(1). Amended Claim 16 recites, in part: "computer readable media embodying software that, when executed by a processor, operates to...select a distributed application." The Specification provides sufficient antecedent basis for a "processor," "software," and "media" readable by a "computer" on at least page 7, lines 1-23 and page 9, line 25 – page 10, line 27.[1] Therefore, amended Claim 16 satisfies the requirements of 37 C.F.R. § 1.75(d)(1). Accordingly, Applicants respectfully request reconsideration and allowance of Claim 16 and its dependents.

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[1] In citing these portions of the Specification, Applicants do not intend to limit the claims to any particular embodiment.

Section 101 Rejection

Claims 1-15 and 31-45

The Office Action rejects Claims 1-15 and 31-45 under 35 U.S.C. § 101. In particular, the Office Action asserts that these claims are not directed to statutory subject matter. (Office Action, p. 3). Without admitting to this assertion, Applicants respectfully submit that Claims 1-15 and 31-45, as amended, satisfy the requirements of 35 U.S.C. § 101. The Federal Circuit recently held that an applicant may show that a claim "satisfies § 101 either by showing that his claim is tied to a particular machine, or by showing that his claim transforms an article." *In re Bilski*, 545 F.3d 943, 961, 88 U.S.P.Q.2d 1385 (Fed. Cir. 2008). Claims 1-15 and 31-45, as amended, are tied to one or more machines. For example, amended Claim 1 recites "executing at least a portion of the distributed application on the selected node, as reset, using the virtual disk image associated with the selected node, the execution performed *by at least one processor* of the selected node." (Emphasis added). As another example, amended Claim 31 recites a "system comprising...a plurality of nodes, *each node comprising at least one processor*." (Emphasis added). Thus, amended Claims 1 and 31 are tied to one or more machines. Accordingly, these claims satisfy the requirements of 35 U.S.C. § 101. For at least this reason, Applicants respectfully request reconsideration and allowance of amended Claims 1 and 31 and their respective dependents.

Claims 16-30

The Office Action rejects Claims 16-30 under 35 U.S.C. § 101. In particular, the Office Action asserts that these claims are not directed to statutory subject matter. (Office Action, pp. 3-4). Applicants respectfully traverse this rejection. Amended Claim 16 is directed to "computer readable media embodying software that, when executed by a processor, operates to" perform the recited functions. Both the Federal Circuit and the Board of Patent Appeals and Interferences (the "Board") have consistently held that such claims satisfy the requirements of 35 U.S.C. § 101. For example, the Board recently held that a claim directed to a "computer usable medium" is statutory under 35 U.S.C. § 101. *Ex Parte William E. Mazzara*, Appeal No. 2008-4741, 2009 WL 291178, *10-*12 (B.P.A.I. February 5, 2009). Specifically, the Board concluded that a claim "directed to a computer usable medium including a program...fall[s] within the meaning of a 'manufacture' as defined in *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)." *Id.* at *10. The Board stated:

> The Examiner has not cited any legal authority for the proposition that a claim to a computer usable media should be barred under 35 U.S.C. § 101 merely because it may incidentally read on nonstatutory subject matter. In fact, if this were the law, all claims to computer readable media would be presumed nonstatutory unless the associated Specifications clearly and unambiguously defined the term "computer readable medium" to be limited to only statutory subject matter. Such a bright-line default rule would be contrary to established precedent. See *Warmerdam*, 33 F.3d at 1359 (holding that "[t]he fact that the claim covers methods which are essentially mathematical in nature...is not dispositive [of whether the claim is directed to statutory subject matter]. Claims should be evaluated by their limitations, not by what they incidentally cover.").
>
> In the present case, there is no express statement in the Specification, nor any other indication in the record, that the term "computer usable medium" is intended to include non-statutory subject matter....Accordingly, we find that the term "computer usable medium" is limited to only tangible manufactures. As such, claim 17 is directed to statutory subject matter.

Id. at *11. Thus, the Board expressly found that a claim directed to a "computer usable medium" is statutory under 35 U.S.C. § 101. *Id.* For analogous reasons, amended Claim 16 of the present Application – which recites "computer readable media embodying software" – is statutory under 35 U.S.C. § 101. Accordingly, Applicants respectfully request reconsideration and allowance of amended Claim 16 and its dependents.

Section 103 Rejection

The Examiner rejects Claims 1-45 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 7,231,430 to Brownell et al. (*"Brownell"*) in view of U.S. Patent No. 6,597,956 to Aziz (*"Aziz"*) and U.S. Patent No. 7,055,148 issued to Marsh et al. (*"Marsh"*). Applicants respectfully traverse this rejection.

The proposed combination fails to support the rejection of Claim 1 for at least three reasons. First, the rejection is improper because the proposed modification in view of *Marsh* would render *Brownell* and *Aziz* unsatisfactory for their intended purposes. Second, the proposed combination fails to teach, suggest, or disclose "resetting a boot image of the selected node based at least in part on the retrieved policy" that is "associated with the distributed application" as recited in Claim 1. Third, the proposed combination fails to teach, suggest, or disclose "associating a virtual disk image with the selected node based at least in part on the retrieved policy" as recited in Claim 1.

First, the rejection is improper because the proposed modification in view of *Marsh* would render *Brownell* and *Aziz* unsatisfactory for their intended purposes. In order to establish a *prima facie* case of obviousness, at least three criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to those of ordinary skill in the art, to modify the primary reference to achieve the claimed invention. M.P.E.P. § 2143.01. Second, there must be a reasonable expectation of success. M.P.E.P. § 2143.02. Third, the prior art references must disclose or suggest all the claim limitations. M.P.E.P. § 2143.03. Furthermore, the M.P.E.P. explicitly states, "If [the] proposed modification would render the prior art invention being modified *unsatisfactory for its intended purpose*, then there is *no suggestion or motivation to make the proposed modification*." M.P.E.P. § 2143.01 (emphasis added); *In re Gordon*, 733 F.2d 900, 902 (Fed. Cir. 1984); *see also KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416, 127 S.Ct. 1727, 1740 (when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious).

An intended purpose of *Brownell* is to provide a control node that assists in deploying virtualized processing area networks. (*Brownell*, col. 3, ll. 4-8). To achieve this purpose, *Brownell* permits communication from the control node but restricts communication between processing nodes. (*Brownell*, col. 4, ll. 51-55). Specifically, *Brownell* states that the "management logic and the control node logic are responsible for establishing, managing and destroying communication paths. The individual processing nodes are *not permitted* to establish such paths." (*Id.*)(emphasis added). *Brownell* further states that "by having communication paths managed and created centrally (*instead of via the processing nodes*) such a *path is not creatable by the processing nodes*, and the defined subnet connectivity cannot be violated by a processor." (*Brownell*, col. 5, ll. 39-45). Thus, *Brownell* restricts processing nodes from establishing communication paths.

In contrast to *Brownell*, the cited portion of *Marsh* discloses a "ring configuration" of network nodes. (*Marsh*, col. 8, l. 35 – col. 9, l. 23; Fig. 5). *Marsh* emphasizes that the ring configuration provides bi-directional communication between the network nodes, which permits a firmware patch to be distributed to networked computer systems. (*Id.*). The Office Action seems to propose modifying *Brownell* to permit the distribution of the firmware patch between network nodes, as described in *Marsh*. (Office Action, p. 6). However, modifying the processing nodes in *Brownell* to distribute a firmware patch among one another, as

disclosed in *Marsh*, would render *Brownell* unsatisfactory for its intended purpose. Such a modification would require establishing communication paths between *Brownell's* processing nodes, which would defeat *Brownell's* purpose of restricting communication paths between processing nodes. (*Brownell*, col. 4, ll. 51-55). Thus, the proposed modification would render *Brownell* unsatisfactory for its intended purpose.

Similarly, to the extent the Office Action proposes modifying *Aziz* in view of *Marshall*, such modification would render *Aziz* unsatisfactory for its intended purpose. The cited portion of *Aziz* discloses a computing grid comprising virtual server farms (VSFs). (*Aziz*, col. 19, l. 45 – col. 21, l. 17). *Aziz* expressly restricts communication between VSFs. Specifically, *Aziz* states: "VSFs in a computing grid *must not be allowed* to communicate with each other to prevent one VSF from in any way causing a change in the configuration of another VSF." (*Id.*)(emphasis added). Modifying the architecture of *Aziz* to permit the distribution of a firmware patch between network nodes, as described in *Marsh*, would render *Aziz* unsatisfactory for its intended purpose. Such a modification would allow the VSFs to communicate with each other to distribute the firmware patch, which would defeat *Aziz's* purpose of preventing communication between VSFs. (*Id.*). Thus, the proposed modification would render *Aziz* unsatisfactory for its intended purpose. Because the proposed modification in view of *Marsh* would render *Brownell* and *Aziz* unsatisfactory for their intended purposes, there is no suggestion or motivation for the proposed combination of references. Accordingly, the *Brownell-Aziz-Marsh* combination should be withdrawn.

Second, the proposed combination fails to teach, suggest, or disclose "resetting a boot image of the selected node based at least in part on the retrieved policy" that is "associated with the distributed application" as recited in Claim 1. The Office Action relies on *Aziz* for the "retrieved policy" recited in Claim 1. (Office Action, p. 6). The cited portion of *Aziz* merely discloses a policy-based rule for adding a Web server to a virtual server farm (VSF) and enforcing firewalling between VSFs according to policy rules. (*Aziz*, col. 11, ll. 7-15; col. 21, ll. 9-17). Even assuming for the sake of argument that the policy-based rule or the policy rules in *Aziz* could properly be considered a "policy," as Claim 1 recites, *Aziz* would still fail to disclose, teach, or suggest the policy-based rule or the policy rules in *Aziz* being in any way "*associated with the distributed application*," as Claim 1 recites. (Emphasis added).

The cited portions of *Brownell* and *Marsh* fail to cure this deficiency of *Aziz*. Notably, the Office Action admits that "*Brownell* is silent about the policy associated with

the distributed application." (Office Action, p. 6). In addition, even assuming for the sake of argument that applying *Marsh's* firmware patch could properly be considered "resetting a boot image" (which Applicants do not admit), there is nothing in *Marsh* that teaches, suggests, or discloses a policy "associated with the distributed application," as Claim 1 recites. Thus, the proposed combination fails to teach, suggest, or disclose "resetting a boot image of the selected node based at least in part on the retrieved policy" that is "associated with the distributed application" as recited in Claim 1. Accordingly, the proposed combination fails to support the rejection of Claim 1.

Third, the proposed combination fails to teach, suggest, or disclose "associating a virtual disk image with the selected node based at least in part on the retrieved policy" as recited in Claim 1. The Office Action relies on *Brownell* for this aspect of Claim 1. (Office Action, p. 5). However, the cited portion of *Brownell* merely discloses a hardware platform that includes processing nodes connected to a switching fabric via a high-speed interconnect. (*Brownell*, col. 2, ll. 56-67). Each processing node is a board that includes processors, network interface cards, and local memory that includes some BIOS firmware for booting and initialization. (*Brownell*, col. 3, ll. 13-17). Control nodes connected to the switch fabric are each a single board that includes processors, local memory and local disk storage for holding independent copies of the boot image and initial file system that is used to boot OS software for the processing nodes and the control nodes. (*Brownell*, col. 3, ll. 21-26). Even assuming for the sake of argument that the independent copies of the boot image and initial file system in *Brownell* could properly be considered a "boot image of the selected node" (which Applicants do not admit), *Brownell* would still fail to disclose, teach, or suggest "dynamically selecting one of a plurality of nodes" and "associating a virtual disk image with the selected node" as recited in Claim 1. *Aziz* and *Marsh* fail to cure this deficiency of *Brownell*. Accordingly, the proposed combination fails to teach, suggest, or disclose each element of Claim 1.

For at least the foregoing reasons, Applicants respectfully request reconsideration and allowance of Claim 1 and its dependents.

In rejecting Claims 16 and 31, the Office Action employs the same rationale used to reject Claim 1. Accordingly, for reasons analogous to those stated above with respect to Claim 1, Applicants respectfully request reconsideration and allowance of Claims 16 and 31 and their respective dependents.
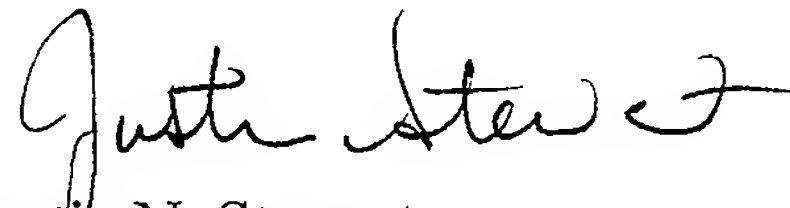
CONCLUSION

Applicants have made an earnest attempt to place this case in condition for allowance. For the foregoing reasons, and for other reasons clearly apparent, Applicants respectfully request full allowance of all pending claims.

If the Examiner feels that a telephone conference would advance prosecution of this Application in any manner, the Examiner is invited to contact Justin N. Stewart, Attorney for Applicants, at the Examiner's convenience at (214) 953-6755.

Although Applicants believe that no fees are due, the Commissioner is hereby authorized to charge any fees or to credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

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